

These two docketed claims were consolidated for the purpose of litigation. The Special Administrative Law Judge (SALJ) determined claimant suffered an aggravation to her preexisting chronic obstructive pulmonary disease because of exposure to chemical fumes while at work for respondent. In Docket No. 255,016, claimant was awarded benefits based upon a 40 percent permanent partial functional impairment. In Docket No. 261,067, the SALJ concluded claimant was permanently and totally disabled from substantial and gainful employment.

On review in Docket No. 255,016, the Board found the claimant suffered a temporary aggravation of her preexisting chronic obstructive pulmonary disease and was only entitled to temporary total disability compensation and medical compensation for the treatment she received until released by Dr. Spann. In Docket No. 261,067, the Board found the claimant was not permanently totally disabled and instead suffered a 52.5 percent work disability.

The Court of Appeals affirmed the Board's conclusions that the claimant did not meet her burden of proof to establish that she suffered permanent impairment in Docket No. 255,016 nor a permanent total disability in Docket No. 261,067. However, the Court of Appeals reversed and remanded the case for reconsideration and recalculation of the beginning date for temporary total disability compensation in Docket No. 255,016.

The respondent filed an additional brief in support of its position regarding the issue of the amount of claimant's temporary total disability compensation in Docket No. 255,016. Respondent notes that in order to statutorily qualify for temporary total disability compensation the claimant must be completely unable to engage in substantial and gainful employment whereas to qualify for unemployment benefits the claimant must demonstrate and represent that she is ready, willing and able to engage in employment. Respondent argues there is a factual contradiction between asserting a total inability to engage in employment while at the same time asserting an ability to engage in employment. Respondent further notes there is a statutory prohibition in unemployment law to receive unemployment benefits while at the same time receiving temporary total disability compensation. Consequently, respondent requests the Board to find claimant failed to meet her burden of proof that she was temporarily and totally disabled during the time she admitted she received unemployment benefits.

On remand, the only issue before the Board is the reconsideration and recalculation of the beginning date for temporary total disability compensation in Docket No. 255,016.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts are not seriously disputed. The claimant began to experience breathing difficulties several months after she began working for respondent in March 1996. However, it was not until a specific incident where claimant inhaled methylethyl ketone in May 1998 that she began receiving medical care from respondent's medical department as well as Drs. Thomas J. Bloxham and Richard W. Spann. Claimant continued working while receiving sporadic medical care. At some point the respondent placed claimant in an office environment as an expeditor in order that claimant avoid chemical exposure. On February 10, 1999, claimant was laid off because respondent would no longer

accommodate her temporary restrictions against exposure to chemicals. The claimant applied for and received unemployment benefits through the end of August 1999. But she was unable to find a job and did not work anywhere after she was laid off by respondent.

After ordering an independent medical examination of claimant following a preliminary hearing on May 18, 2000, the ALJ took under advisement the claimant's request for temporary total disability compensation. By separate Order dated May 18, 2000 the ALJ authorized Dr. Spann to provide claimant medical treatment. Claimant continued to receive treatment with Dr. Spann until he released claimant without restrictions in approximately August 2000. The respondent then re-hired claimant and she returned to work on September 21, 2000. However, on September 25, 2000, claimant again suffered exposure to chemical fumes and had to be transported to the emergency room because of breathing difficulties. This specific incident is the subject of claimant's claim in Docket No. 261,067.

After claimant was laid off on February 10, 1999, she received unemployment benefits through the end of August 1999, while she looked for employment.

Temporary total disability is defined in K.S.A. 44-510c(b)(2) as follows:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.

In this instance, after claimant was laid off, she began receiving unemployment benefits and actively engaged in the required job search to qualify for those benefits.¹ As a result the Board made the factual determination that she was able to engage in employment and did not qualify for temporary total disability compensation during the time period she was receiving unemployment benefits.

In its opinion, the Court of Appeals noted:

In passing, we also note that the Board cites no authority for its conclusion that Guillaume was not entitled to compensation for the period between the accident and August 1999 because she received unemployment compensation. K.S.A. 44-501(h) prevents a double recovery when a claimant is already receiving retirement benefits. However, we are aware of no comparable statute preventing dual recovery when a claimant is receiving unemployment benefits. Thus, upon its further review the Board should specify the basis for this conclusion. We note that there are other benefits that do not constitute an offset against workers compensation benefits, such as the work-related disability benefits discussed in

¹ See P.H. Trans. (May 18, 2000) at 28.

Green v. City of Wichita, 26 Kan. App. 2d 53, 56-57, 977 P.2d 283, rev. denied 267 Kan. 888 (1999).

Initially, the Board would note that it denied claimant temporary total disability compensation for the time period claimant was receiving unemployment benefits based upon the factual determination that claimant was able to engage in employment activities during that time period. As previously noted, K.S.A. 44-510c specifically requires an inability to engage in any employment in order to qualify for temporary total disability compensation. The fact claimant was looking for work demonstrated that she was able to engage in employment activities. The claimant testified:

Q. After being laid off did you apply for unemployment?

A. Yes.

Q. Did you receive unemployment?

A. Yes. I was not offered a job by anybody I went to see.

Q. When did you last receive unemployment benefits?

A. I'm not sure. End of August or beginning of September of '99.²

Consequently, the Board made the factual determination that claimant did not meet the statutory definition of being totally unable to engage in any employment. Simply stated, claimant was actively seeking employment which demonstrated that she was able to engage in employment if offered a job. Claimant failed to meet her burden of proof that she was unable to work.

Secondly, although not pertinent to the Board's factual decision, it should be noted that K.S.A. 44-706(h) prohibits recovery of unemployment benefits while receiving temporary total disability compensation. In 9 Larson's Workers' Compensation Law §157.01 the impropriety of duplicate benefits was addressed, in part, in the following fashion:

Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a worker undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should

² *Id.* at 28.

receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workers' compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grab-bag of assorted unrelated benefits.

Upon remand, the Board again concludes and makes the factual determination that during the time period when claimant was unsuccessfully looking for employment and receiving unemployment benefits she did not meet the statutory definition of being completely incapable of engaging in substantial and gainful employment. Accordingly, claimant was not entitled to temporary total disability compensation for that time period.

After claimant was laid off she drew unemployment benefits while she looked for employment. She testified that the unemployment benefits terminated in August or early September 1999.

When claimant filed her first application for preliminary hearing she had sent respondent a Notice of Intent To File Application For Preliminary Hearing letter dated April 14, 2000. In that letter claimant requested "Payment of temporary total disability payments **if taken off work.**" (Emphasis Added) Such a request implies that claimant had not been taken off work at that time by Dr. Spann who was providing claimant some treatment and whom claimant wanted authorized to continue providing treatment. At the preliminary hearing held on May 18, 2000, the claimant agreed she was requesting temporary total disability compensation from April 14, 2000.³

At the May 18, 2000 preliminary hearing, the claimant testified she was unaware of any job she could perform because of her difficulty breathing. Based upon that testimony the Board concluded claimant had met her burden of proof that she was entitled to temporary total disability benefits commencing May 18, 2000. Claimant had not been taken off work by any doctor but her testimony was deemed sufficient evidence to meet her burden of proof that she was entitled to temporary total disability benefits. The claimant's testimony alone is sufficient evidence of her physical condition.⁴

By Order dated May 18, 2000, the ALJ authorized Dr. Spann to continue to treat claimant which the doctor did until he released her without restrictions in August 2000. Consequently, the Board concluded claimant was entitled to temporary total disability compensation from May 18, 2000, through August 1, 2000, or a period of 10.86 weeks in Docket No. 255,016. In summation, although there was no medical evidence that a

³ *Id.* at 4.

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

physician had taken claimant off work, the Board concluded claimant's testimony at the May 18, 2000 preliminary hearing met her burden of proof to establish that at that time she was temporarily and totally disabled which continued until the court ordered physician released her without restrictions August 1, 2000.

In its opinion, the Court of Appeals noted:

We find nothing in the record to suggest that Guillaume was less disabled before she began seeing Spann. Thus, the Board's calculation of the beginning date for Guillaume's temporary total disability compensation is not supported by substantial evidence and we must reverse that portion of the award and remand the case for reconsideration and recalculation of the beginning date for Guillaume's temporary total disability compensation.

As previously noted, at the time of the May 18, 2000 preliminary hearing claimant had not been taken off work by a physician. However, as the litigation progressed and in response to a question from claimant's attorney, Dr. Daniel C. Doornbos sent a letter dated January 31, 2001, and noted "Given her difficulties I think it would have been hard for her to have worked from February 10, 1999, to the present time and I agree with her having been kept off work."

But Dr. Doornbos did not first examine claimant until after she attempted to return to work with respondent in September 2000 and suffered her second exposure which is the subject of her claim in Docket No. 261,067. And, as previously noted, claimant was not kept off work during the entire time period and was in fact looking for work while drawing unemployment benefits. Moreover, it is unclear from the response whether the doctor was referring to employment with respondent or any and all employment nor was that opinion clarified during his deposition testimony. Because claimant had been seeking employment and had not been taken off work it appeared the doctor's opinion was based upon an incorrect history. As a result, the Board was not persuaded by his written response to claimant's attorney's inquiry when it initially determined the time period claimant was entitled to temporary total disability benefits in Docket No. 255,016.

Nonetheless, the remand language from the Court of Appeals contains the language making the finding there is "nothing in the record to suggest that Guillaume was less disabled before she began seeing Spann." Consequently, the Board concludes claimant is entitled to temporary total disability compensation beginning September 1, 1999, when her unemployment benefits terminated and, presumably, she stopped looking for work.

In summation, the Board again concludes and makes the factual determination that during the time period claimant was actively seeking employment while receiving unemployment benefits she did not meet the statutory definition of being completely and temporarily incapable of engaging in any type of substantial and gainful employment. This determination is based upon the fact claimant testified she was actively looking for work.

Implicit in her job search was the fact that during that time period she was capable of engaging in substantial and gainful employment and because she was only entitled to unemployment benefits if she was able to work, was available for work and making reasonable effort to obtain work.⁵ Because of the Court of Appeals remand language that “there is nothing in the record to establish that claimant was less disabled before seeing Dr. Spann,” the Board is compelled to conclude claimant’s temporary total disability compensation must commence when claimant no longer sought gainful employment which apparently coincided with the termination of her unemployment benefits. Based upon the record, claimant testified those benefits terminated September 1, 1999. Consequently, the Board finds claimant is entitled to temporary total disability compensation from September 1, 1999, through August 1, 2000.

AWARD IN DOCKET NO 255,016

WHEREFORE, it is the finding of the Board, upon remand, that the claimant is entitled to temporary total disability compensation commencing September 1, 1999, through August 1, 2000.

The claimant is entitled to 48 weeks of temporary total disability compensation at the rate of \$366 per week or \$17,568 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁵ K.S.A. 44-705(c)

c: Stephen J. Jones, Attorney for Claimant
 Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge
 Paula Greathouse, Workers Compensation Director